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Chairman: Mr. Yañez-Barnuevo ..... (Spain)

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The meeting was called to order at 3.05 p.m.

Agenda item 80: Report of the International Law Commission on the work of its fifty-seventh session (*continued*) (A/60/10)

1. **Sir Michael Wood** (United Kingdom) said that the Special Rapporteur's tenth report on reservations to treaties (A/CN.4/558 and Adds. 1 and 2) was a classic in its field, both in the practice set out and in the analysis of the practice and doctrine. It went to the core issues of the topic, and as a result it merited careful study and debate before definitive conclusions were drawn.

2. With respect to the process of objecting to reservations, a major problem for many States was the paucity of resources within foreign ministries for considering the many reservations formulated by others. Moreover, there might often be a policy reason for not reacting to a reservation; relations with the reserving State or the subject matter involved might be delicate. In view of the practical and policy problems, it was not clear what significance should be attached to a failure to object to a reservation. One suggestion might be to develop further best practice in the field, a subject which might usefully be considered at the 2006 International Law Week. In certain European institutions it had been found helpful for member States to consider reservations collectively.

3. The Commission had asked for comments on the practice whereby States objected to a reservation that they considered incompatible with the object and purpose of a treaty, but without opposing the entry into force of the treaty between themselves and the author of the reservation. Although that was a crucial and difficult matter, in practice the issue of compatibility with the object and purpose of a treaty arose in a relatively small number of rather extreme cases. The vast majority of reservations were dealt with satisfactorily through the operation of the normal rules of the 1969 Vienna Convention on the Law of Treaties and the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (Vienna Conventions). The advisory opinion of the International Court of Justice on reservations to the Convention on the Prevention and Punishment of the Crime of Genocide had stated that acceptance of a reservation as being compatible with the object and purpose of the Convention entitled a party to consider the reserving State to be a party to the treaty. Conversely, where the reservation was not compatible with the object and purpose, the State could not be regarded as being a party to the Convention. That was the approach that the United Kingdom had consistently followed in its own treaty practice, and it did not appear to differ significantly from the approach of the Special Rapporteur.

4. On the related issue of the "super-maximum effect" of an objection, consisting in the determination not only that the reservation objected to was not valid but also that, as a result, the treaty as a whole applied ipso facto in the relations between the two States, his delegation considered that that could occur only in the most exceptional circumstances, for example, if the State making the reservation could be said to have accepted or acquiesced in such an effect.

5. He was sceptical about the value of seeking to define the concept of the "object and purpose" of a treaty in the abstract, but it was helpful to consider how it had been approached in individual cases in practice. The proposed draft guidelines 3.1.7 to 3.1.13 should perhaps be moved into the commentary. He also had doubts about the attempt to define the term "specified reservations", being unsure that the definition offered had captured all the circumstances in which reservations could be specified within the meaning of article 19, subparagraph (b), of the Vienna Conventions. The importance of the vexed terminological issue of the use of "validity" versus "permissibility" might have been overstated; the answer might become clear once the overall structure of that part of the draft guidelines was complete.

6. With regard to draft guideline 3.1, his delegation had no problem with the text, which was taken from article 19 of the 1986 Vienna Convention, but felt that in the title, "Freedom to formulate reservations", the word "freedom" was not apt in the context of the reservations regime of the Vienna Conventions. The United Kingdom shared the doubts about the presumption of validity of reservations, since there must be a balance between the need to facilitate participation in a treaty and the need to maintain the unity of the treaty. Care should be taken not to fragment that aspect of the law of treaties. Any suggestion that special rules on reservations might apply to treaties in different fields, such as human rights, would not be helpful. It should not be forgotten

that the modern law on reservations to multilateral treaties owed its origin to the advisory opinion of the International Court of Justice on reservations to the Genocide Convention.

7. With regard to the topic "Shared natural resources", the United Kingdom had no direct interest in transboundary aquifers and aquifer systems but looked forward to the Commission's work on other aspects of the topic. His views on the topic "Unilateral acts of States" had not changed.

8. **Mr. Hernes** (Norway), speaking on behalf of the five Nordic countries (Denmark, Finland, Iceland, Norway and Sweden) on chapter IV of the Commission's report, welcomed the priority given by the Commission to the topic "Shared natural resources" and commended it for the complete set of draft articles on transboundary aquifers and aquifer systems. However, whether adopted as a convention or a non-binding instrument, those articles would not remove the need for concrete bilateral and regional arrangements, as well as a supplementary regulatory framework to resolve outstanding issues. Accordingly, he was pleased that draft article 3 encouraged States to enter into such arrangements. The Nordic countries also welcomed the fact that the draft articles took into account the need to protect and preserve ecosystems within a transboundary aquifer or aquifer system and provided for the obligation to prevent, reduce and control the pollution of such aquifers or aquifer systems that might cause significant harm to other aquifer States or to their environment. In addition, the Nordic countries fully supported the obligations contained in draft articles 16 and 17. Assessments of the potential effects of planned activities on a transboundary aquifer or aquifer system would be crucial to ensure the sustainable use of those resources.

9. Lastly, he noted with satisfaction that the focus of the topic at issue had become the transboundary nature of the aquifers. Since the term "shared resources" could be rather misleading in that context, the Nordic countries fully supported renaming the topic thereby making it clear that the Commission wished to enhance ways and means of ensuring the sustainable use of transboundary aquifers within the general framework of territorial sovereignty and jurisdiction of States.

10. **Mr. Trauttmansdorff** (Austria) said that his delegation welcomed the approach taken by the Special Rapporteur on unilateral acts of States in his eighth report (A/CN/4/557), and agreed that it was too early to establish draft provisions. Instead, the Commission should continue to review existing State practice and on that basis elicit a framework and possible principles.

11. In that regard, his delegation wished to offer two practical examples of unilateral acts. In 1955 Austria had adopted a constitutional law declaring its permanent neutrality. It had notified all States with which it then had diplomatic relations with the request that they should recognize Austria's neutrality. Some States had explicitly recognized its neutral status; others had not objected to it. Austria's permanent neutrality had therefore resulted from a unilateral act based on national legislation and was valid as long as that legislation was in force. There was little established international practice regarding what would be required to terminate that status formally in the event of a change in the relevant legislation; termination by *contrarius actus* seemed to be the most appropriate idea.

12. The second example related to negative security guarantees. When such declarations had first been made in 1978 by the foreign ministers of the nuclear Powers, Austria had concluded, on the basis of international judicial precedent, that the declarations were binding on the respective nuclear Powers. However, the nuclear Powers had announced that it had not been their intention to create obligations binding under international law. A similar situation had occurred with the declarations made in 1995. In view of that practice, his delegation agreed with the view that the intent of the State to commit itself was an important feature of the identification of unilateral acts as sources of international law.

13. On the topic "Reservations to treaties", his delegation highly commended the tenth report of the Special Rapporteur (A/CN.4/558 and Add.1) and welcomed in principle the guidelines adopted by the Commission at its fifty-seventh session. His delegation did have some doubts whether draft guidelines 2.6.1 and 2.6.2 would clear up the confusion left by the Vienna Convention on the Law of Treaties. One source of confusion was uncertainty as to whether the provisions on objections in articles 20 and 21 of the Vienna Convention also applied to the provisions in article 19 on reservations that were not admissible. The negotiating process leading to the Convention suggested that an objection could produce at least two

kinds of effects: either the objecting party would declare that the reservation was prohibited (in the Special Rapporteur's language "invalid") under article 19, or the objection would produce the effects envisaged in articles 20 and 21.

14. In order to avoid confusion it would be better to distinguish those different kinds of objection by giving them different designations. An objection to the admissibility of reservations under article 19 should be called a "rejection"; the term "objection" should be reserved for the second type of reaction, and the two kinds of reactions to reservations should be dealt with in two different sub-guidelines. Moreover, there was a third category of reactions to reservations covered by the definition contained in draft guideline 2.6.1, which consisted of a declaration by one party to a treaty stating that it had doubts regarding the admissibility (or validity) of a reservation owing to the lack of clarity of the reservation, a problem addressed in draft guideline 3.1.7.

15. With regard to the draft guidelines proposed by the Special Rapporteur, his delegation welcomed the introduction of criteria to determine the object and purpose of a treaty and would recommend combining draft guidelines 3.1.5 and 3.1.6, since the criteria were more important than the definition, which was by its nature subjective. It appreciated the attempt in draft guideline 3.1.7 to single out vagueness and generality as criteria in determining invalidity and agreed that it was the impossibility of assessing the compatibility of such reservations with the object and purpose of the treaty, rather than the certainty that they were incompatible, that made them fall within the purview of article 19, subparagraph (c), of the Vienna Convention.

16. However, it might be the case that a vague reservation was not incompatible with the object and purpose of a treaty. In such cases, it might be advisable to enter into a dialogue with the author of the reservation to clarify its compatibility; if the author refused to cooperate, in case of doubt the reservation would be considered contrary to the object and purpose. Another solution would be to declare vague reservations inadmissible or invalid because they did not meet the condition in article 2, paragraph 1 (d), of the Convention that they must be directed towards "certain provisions of the treaty".

17. His delegation would prefer the material in draft guidelines 3.1.8 and following to be placed in the commentary, thereby reducing the risk of abuse if the reasons listed in them for characterizing a reservation as contrary to the object and purpose of a treaty were taken as limitative. Lastly, Austria agreed to the use of the term "validity" as discussed in the report.

18. His delegation commended the set of 25 draft articles on shared natural resources proposed by the Special Rapporteur for the topic but believed that the well-established precautionary principle ought to be included in them. The legal form the articles should take should be discussed only after the content had been further refined. The main purpose of the draft articles was to provide a framework for the elaboration of legally binding agreements between States that shared groundwater resources.

19. For more detailed comments on the aforementioned topics he urged Committee members to read the written statement of Austria, which would be circulated.

20. **Mr. Ehrenkrona** (Sweden), speaking on behalf of the five Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), said, with respect to the topic "Reservations to treaties", that the general principle that the formulation of reservations was permitted was fundamental to the entire reservations regime, although the right to formulate reservations was not absolute. The Nordic countries agreed with the view that article 19 of the Vienna Convention established the presumption of freedom to formulate reservations, which was substantially different from the presumption of validity of reservations.

21. The Nordic countries wished to focus on the criterion of the compatibility of a reservation with the object and purpose of a treaty and welcomed the attention currently being devoted to it by the Commission. There was fairly well established State practice in Europe in that area, particularly with regard to human rights treaties. Draft guideline 3.1.5 attempted to define the elusive concept of "object and purpose". Use of the term "raison d'être", although acceptable, provided little clarification, being equally elusive. A definition might not be necessary, since the terminology used in the Vienna Convention reflected established legal principles for the teleological method of interpreting of treaties. The practice of an increasing number of States, including the Nordic countries, when

objecting to reservations incompatible with the object and purpose of a treaty, was to sever the reservation in question from the treaty relation on the basis of the clear intent of article 19, subparagraph (c), of the Vienna Convention that a reservation incompatible with the object and purpose of the treaty should not be permitted. To permit such reservations would undermine the entire multilateral treaty system.

22. The issue of the legal effect of objections to such reservations could be approached by looking at article 21 of the Vienna Convention, which concerned the legal effect of reservations and objections to reservations formulated in accordance with article 19. A reservation incompatible with the object and purpose of a treaty was not formulated in accordance with article 19, so that the legal effects listed in article 21 did not apply. When article 21, paragraph 3, stated that the provisions to which the reservation related did not apply as between the objecting State and the reserving State to the extent of the reservation, it was referring to reservations permitted under article 19. It would be unreasonable to apply the same rule to reservations incompatible with the object and purpose of a treaty. Instead, such a reservation should be considered invalid and without legal effect. Theoretically, an objection was not necessary in order to establish that fact but was merely a way of calling attention to it. The objection therefore had no real legal effect of its own and did not even have to be seen as an objection per se; consequently, the time limit of twelve months specified in article 20, paragraph 5, of the Convention, should not apply. However, in the absence of a body that could authoritatively classify a reservation as invalid, such as the European Court of Human Rights, such "objections" still served an important purpose.

23. The practice of severing reservations incompatible with the object and purpose of a treaty accorded well with article 19, which made it clear that such reservations were not expected to be included in the treaty relations between States. While one alternative in objecting to impermissible reservations was to exclude bilateral treaty relations altogether, the option of severability secured bilateral treaty relations and opened up possibilities of dialogue within the treaty regime. However, account must be taken of the will of the reserving State regarding the relationship between the ratification of a treaty and the reservation.

24. The Nordic countries hoped that that constructive State practice would be reflected in the outcome of the Commission's work and wished to underline the importance, if a definition were to be elaborated, of not narrowing the scope of the compatibility criterion as understood in current practice or of the severability doctrine. It was essential to reflect the developing State practice in the area of incompatible reservations in the draft Guide to Practice if the Guide was to be widely used and accepted by States.

25. **Mr. Lammers** (Netherlands) said that, since many of the Netherlands' natural resources were shared with other States or located in areas beyond the limits of its national jurisdiction, his delegation attached great importance to the international regulation of that field. However, his Government still had a number of concerns about the general approach to the topic. First, the draft articles proposed by the Commission covered only aquifers, which seemed to preclude the possibility of developing a comprehensive set of rules governing all shared natural resources. It was also unclear why the draft articles could not apply also to gaseous and liquid substances other than groundwaters. Due attention should be given to the relationship between groundwater and such other substances before completing the first reading of the draft articles rather than the second, as suggested by the Special Rapporteur.

26. Second, the presentation of the proposals as draft articles left little doubt as to the preferred final form of the instrument. Indeed, the draft articles could only prevail over the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses if they were adopted in the form of a legally binding instrument. However, while all States would be free to participate in such an instrument, participation was likely to be considered only by the relatively small number of States in whose territory any part of a transboundary aquifer or aquifer system was located. Furthermore, if the proposed rules were intended merely as a framework, States were unlikely to consent to be bound by a convention if the subject matter was to be regulated by bilateral and regional arrangements. The relatively scarce treaty practice in the field of shared natural resources might also be a reason to rethink the framework approach, particularly since States would always have the freedom to deviate from or complement the provisions of a treaty inter se to the extent that such a treaty did not contain jus cogens.

27. Turning to draft article 7, he said that paragraph 1 correctly presented the prevention aspect as a duty of

due diligence. However, the formulation of paragraph 3 mirrored that of the equivalent provision of the 1997 Convention and did not, therefore, take into account the progress made by the Commission on the question of compensation in recent years. Accordingly, having regard to the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, it seemed appropriate to replace the phrase "discuss the question of compensation" with the words "ensure that prompt and adequate compensation is provided".

28. With regard to draft article 14, he said that further consideration should be given to the formulation of the second sentence and the arguments underlying it. Unlike the Special Rapporteur, the Government of the Netherlands took the view that the precautionary principle was already part and parcel of customary international law. In addition, and irrespective of that view, the Netherlands preferred the term "precautionary principle" to the existing "precautionary approach". Moreover, the second sentence did not reflect the fact that precaution was not dictated by uncertainty about the state of the environment alone, but by uncertainty about the impact of a human activity on the environment.

29. Turning to chapter X of the Commission's report, he observed that States parties, as guardians of a particular treaty, appeared to have a moral, if not legal, obligation to object to a reservation that was contrary to the object and purpose of that treaty. They must therefore develop a consistent practice in that field and give adequate consideration to what was and was not contrary to the object and purpose of a particular treaty. It was equally important to establish an administrative structure to facilitate the submission of objections within the time limit set by article 20 of the Vienna Convention on the Law of Treaties.

30. By objecting to a reservation deemed to be contrary to the object and purpose of a particular treaty without opposing the entry into force of the remainder of that treaty, objecting States might be perceived as attaching too little importance to the nature of the reservation. However, contemporary treaties, in particular human rights treaties, contained a multitude of substantive rules, a great many of which were self-contained. Thus, when evaluating the impact of a reservation considered to be contrary to the object and purpose of a treaty, consideration should be given to whether the impact of that reservation would be limited to the provision itself or whether it would have a broader effect on the substantive content of a treaty. In the former case, there was evidently no need to exclude the possibility of applying the remainder of the treaty between the reserving State and the objecting State. Consequently, the premise was that, on balance, it was more attractive for the objecting State to enter into treaty relations, albeit limited, with the reserving State than not to enter into treaty relations at all. While article 21, paragraph 3, of the Vienna Convention on the Law of Treaties had provided the flexibility required in contemporary practice, it had also given rise to a certain à la carte approach by reserving States.

31. Nevertheless, in some cases, an objecting State had chosen to enter into treaty relations despite the fact that the reservations made were of a very broad, extremely general and imprecise nature. In such cases, the objecting State had probably decided that the reserving State should remain accountable to it in respect of the remainder of the treaty. In addition, since the entry into force of the Vienna Convention on the Law of Treaties, the primary function of an objection had changed. In the current system, the political aspect of an objection, namely, the view expressed by the objecting State on the desirability of a reservation, played a central role, and the legal effects of such an objection were becoming increasingly peripheral.

32. With regard to the tenth report on reservations to treaties (A/CN.4/558 and Add.1) he said that it was difficult to understand why the Commission, which had met with the other human rights treaty bodies to discuss reservations, had not met with the Committee on the Elimination of Discrimination against Women also. The Netherlands fully supported the idea of holding a seminar on the subject of reservations to human rights treaties and trusted that the Committee on the Elimination of Discrimination against Women would be invited to participate. His delegation would be interested in hearing about the outcome of the seminar, and in particular whether the Commission's work in that area had been of relevance to the related activities of the treaty bodies.

33. The Netherlands agreed with the Special Rapporteur that "object and purpose" must be understood as one and the same notion rather than as two separate concepts and that that notion referred to the core obligations (or raison d'être) of a treaty. However, a degree of subjectivity was involved in determining those core obligations and it must

therefore be acknowledged that, while the law of treaties appeared to be a set of neutral secondary rules on the legal effects of treaties, it did contain some subjective elements.

34. Lastly, he said that the Special Rapporteur's extremely useful work on reservations should be brought to a conclusion in the near future. He hoped that the Commission would finalize the guidelines in 2006 so that they could be distributed to States.

35. **Mr. Jaafar** (Malaysia), referring to the topic "shared natural resources", noted that, in his third report (A/CN.4/551 and Corr.1 and Add.1) the Special Rapporteur had incorporated the term "geological formation" into draft article 2, thereby taking account of Malaysia's previous observation that an aquifer or aquifer system could consist not only of rock but also of other naturally occurring materials, consolidated or unconsolidated, such as gravel and sand.

36. He proposed deleting the word "harmonized" from draft article 10, paragraph 1, since the establishment of universally applicable standards and methodologies for monitoring a transboundary aquifer or aquifer system might impose too great an obligation on aquifer States and, given the differences between aquifers and aquifer systems in the respective aquifer States, might not be practical. In that connection, his delegation agreed with the Commission that it was more appropriate to incorporate such a provision into bilateral or regional arrangements. He also endorsed the use of the word "encouraged" in draft article 14.

37. Lastly, he noted that draft article 21, inter alia, protected an aquifer State from being compelled to provide data or information that was vital to its national defence and security, although it did not provide for such protection on the basis of national interest. Nevertheless, Malaysia supported the proposal to extend the protection provided under that article to cover industrial secrets and intellectual property.

38. **Ms. Woollett** (Australia) expressed her delegation's continued support for efforts to revitalize the Sixth Committee's consideration of the Commission's report, in particular the increased number of interactive discussions with Commission members.

39. With regard to the topic "Reservations to treaties", she congratulated the Special Rapporteur for having sought to clarify the interpretation of article 19 of the Vienna Convention on the Law of Treaties. The draft guidelines, which were intended to be a code of recommended practices rather than a set of binding rules, provided direction in terms of which categories of reservations might be considered contrary to the object and purpose of a treaty. The Commission had requested Governments to comment on the practice of objecting to a reservation without opposing the entry into force of the treaty. In that connection, Australia expected that States making reservations would do so only in good faith and would not attempt to frustrate their own stated purpose of entering into the treaty.

40. When, on becoming party to a treaty, a State made a reservation in good faith and that reservation was objected to by another State, Australia expected that the provision to which the reservation related would not apply between the reserving State and the objecting State. There might also be cases in which the objecting State objected to the treaty as a whole, not just the provision to which the reservation related, entering into force between itself and the reserving State. However, the objecting State might also have good reasons not to follow that course of action and might instead prefer at least some elements of the treaty in question to apply between itself and the reserving State. The Vienna Convention on the Law of Treaties, in particular articles 20 and 21 thereof, did address those issues, but it was possible that those articles were not intended to apply to reservations prohibited under article 19.

41. **Mr. Sheeran** (New Zealand) observed that water was essential to human survival and the topic "Shared natural resources" would become increasingly important since underground aquifers represented most of the world's fresh water supply. His delegation supported the Special Rapporteur's approach to the topic and, in particular, his decision to seek advice from hydrogeologists and other experts. The legal norms adopted should make sense to those working with aquifers at a practical level and, while much remained to be done, the Working Group on Transboundary Groundwaters had already made considerable progress.

42. Currently, the draft articles focused, as was appropriate, on the obligations of States in which transboundary aquifers were located. However, it might also be appropriate to include some very general duties applicable to all States in order to acknowledge that the issue had a wider international dimension. Such a

structure would also reflect the flow of more general to more specific recommendations at the global, national and regional levels contained in a number of other international regimes on environmental questions.

43. Transboundary aquifers must be managed by the relevant countries at the regional or local level and in such a way as to take account of the specific features of each individual aquifer. Accordingly, it might be more useful to adopt the draft articles as recommendatory principles rather than as a convention. A set of such principles would represent an authoritative statement of the international standards and best practice in the area and could be regarded as the framework within which the relevant bilateral and regional negotiations would take place.

44. The topic "Unilateral acts of States" had been a difficult one. However, the case studies in the Special Rapporteur's eighth report (A/CN.4/557) were very useful, as they illustrated the essential point of the topic, namely, that unilateral acts of States could produce legal effects and might even result in a State being unintentionally bound by its acts. He agreed with the Commission that it was not appropriate to produce definitions and rules comparable to the regime established by the Vienna Convention on the Law of Treaties, since the circumstances of a particular unilateral act that might produce legal effects were so diverse and dependent on contextual factors as to be almost impossible to codify. However, the Working Group had made a useful contribution to the topic and the Commission should conclude its work by drawing some reasonably broad conclusions from the case studies.

45. With regard to the topic "Reservations to treaties", his delegation had no particular difficulties with the guidelines adopted by the Commission at its most recent session but it would be very interested in the outcome of the Commission's further consideration of the difficult issue of reservations that were incompatible with the object and purpose of the treaty. His delegation had some doubts about whether it would be useful or even possible to specify in guideline form the object and purpose of a given treaty, since some treaties might have more than one object and purpose. In addition, his delegation was not sure whether it would be possible to state categorically that particular categories of reservation would always be prohibited on account of being contrary to the object and purpose of a treaty.

46. **Mr. Hasegawa** (Japan) commended the Commission on the substantial progress it had made on the topic "Shared natural resources" during the year, and especially on the establishment of the Working Group. Groundwaters were an indispensable resource for human beings and in view of the topic's importance careful consideration of it was to be expected. In that regard, the assistance of groundwater experts from international organizations such as the United Nations Educational, Scientific and Cultural Organization, the Food and Agriculture Organization of the United Nations and the International Association of Hydrogeologists was greatly appreciated. Given the critical nature of the topic, the Commission must draw some conclusions and produce output at an early stage. The shortage of groundwater resources as a result of over-exploitation and pollution was currently one of the clear and imminent worldwide environmental threats, and there was an absolute need to have some legal framework on the topic. It was the Commission's task to respond to that need within an appropriate time, and it should avoid being overly ambitious by trying to incorporate premature rules and principles into the instrument.

47. During the discussion in the Commission, some members had insisted on including provisions on the precautionary principle or the duties of non-aquifer States, but the incorporation of such rules might result in long years of unnecessary debate in the Commission, and even if some conclusions were eventually reached the entire topic might turn out to be rather outdated by the time the work was completed. The Commission should address the issue in a realistic manner, and should maintain, or even hasten, the pace of its consideration.

48. In his third report (A/CN.4/551 and Corr.1 and Add.1), the Special Rapporteur had proposed that recharging and non-recharging aquifers should be treated differently, because different rules would apply to each category. Some members of the Commission had pointed out that the criteria for that distinction seemed to be insignificant from a practical perspective, but his delegation supported the Special Rapporteur's proposal. While from a purely theoretical and technical perspective there might be cases in which it was not easy to make such a distinction, it would be sustainable in respect of most transboundary aquifers and would be feasible for the purposes of the instrument.

49. With regard to draft article 7, there had been a debate in the Commission concerning the reference to "compensation". His delegation considered that the problem of liability or responsibility could more properly be dealt with in other instruments, and that inclusion of those rules in the instrument under discussion might complicate the Commission's work. If a reference to "compensation" were to be included, it should be kept in a non-obligatory form, as proposed by the Special Rapporteur.

50. With regard to the form of the final instrument, his delegation fully agreed with the Special Rapporteur that the Commission should focus on substance rather than form at the current early stage, and that the existing form should not be considered as prejudging the final outcome. The Commission should take the relevant decision at a later stage, taking into account the views expressed in the Sixth Committee.

51. His delegation supported the Working Group's proposal that it should reconvene during the Commission's fifty-eighth session to complete its work, and hoped that the Commission would make further substantial progress during the coming year and proceed to the drafting process at the earliest possible date.

52. Turning to the topic "Unilateral acts of States", he noted that the Special Rapporteur's eighth report (A/CN.4/557) contained a detailed presentation of eleven examples or types of such acts. There was a lack of common understanding regarding the concept, which was not without ambiguity, so the Special Rapporteur had been correct to devote most of his examination to State practice in order to deepen the comprehension of the topic. Nevertheless, the debate had shown a tendency to go round in circles, and nine years of consideration had not produced as significant an achievement as might have been expected. That seemed to have been largely due to the diversity of practices categorized as unilateral acts of States. The form, content, authors and addressees of such acts were diverse, and at the current stage it seemed that it would be difficult to formulate a definition representing a meaningful legal concept covering all the acts discussed under the topic.

53. Some members of the Commission had expressed doubts as to the appropriateness of the topic for codification. His delegation, however, believed that its codification should be viewed as a means of obtaining guidelines concerning the extent to which States might be considered bound by their own voluntary commitments. The elaboration of a legal regime applicable to such acts would help to clarify their legal effect and thereby enhance certainty and stability in international relations. In order to expedite its work, the Commission might have to concentrate on certain categories of acts, rather than proceeding with the codification under the general heading of "Unilateral acts of States".

54. As to the points on which the Commission had requested comments and observations (A/60/10, para. 28), his Government considered that the revocability and modification of unilateral acts depended on the form, content, authors and addressees of the act, and must be determined by examining each category or type of unilateral act. His delegation looked forward to the preliminary conclusions which were to be submitted by the Special Rapporteur at the Commission's next session, and it would facilitate further consideration of the topic.

55. Turning to the topic "Reservations to treaties", he said that his delegation shared the Special Rapporteur's view that the guidelines must be as detailed and comprehensive as possible in order to be practical and workable. Ten years had passed since the Commission had begun considering the topic, and it would be appreciated if the work were to be completed soon, and the entire set of guidelines presented to the Committee in the near future. He requested the Special Rapporteur to provide the Committee with the time-line for the completion of the Commission's work in 2006.

56. In his tenth report (A/CN.4/558 and Add.1), the Special Rapporteur had proposed using the term "validity" instead of controversial terms such as "permissibility", "admissibility" and "opposability". His delegation basically supported the approach of using a more neutral term so as to avoid eliciting a largely academic debate on the legal nature of the reservation. It might, however, be more pragmatic to leave the terms in brackets for the time being and return to them after considering all the possible effects of reservations.

57. With regard to the points on which the Commission had requested comments (A/60/10, para. 29) he said that even if an objecting State declared that a reservation was incompatible with the object and purpose of the treaty, it could maintain treaty relations

with the reserving State in respect of all other treaty provisions. Unless a third party organ, such as an international court, decided the object and purpose of the treaty, it was usually for each individual State to decide such matters. A common understanding regarding the object and purpose of the treaty could be formed through the accumulation of instances of objection, acquiescence or approval with regard to the reservation. If a State objected to another State's reservation, declaring that it was not compatible with the object and purpose of the treaty but without opposing the entry into force of the treaty between the two States, the immediate effect of the objection was limited to the exclusion of the relevant provision. However, through its declaration of incompatibility, the objecting State expressed its interpretation of the treaty, which could influence other States' interpretations. The declaration might also send a message to the reserving State, which might feel obliged to withdraw the reservation if the majority of States objected to it. His delegation hoped that there would be a detailed discussion of the issue, including consideration of the points it had raised, at the Commission's next session.

58. **Mr. Lavalle-Valdés** (Guatemala), speaking on the topic "reservations to treaties" and referring to draft guideline 2.6.1, said that unless an objection to a reservation stated, under article 20, paragraph 4 (b), and article 21, paragraph 3, of the Vienna Conventions, that the author opposed the entry into force of the treaty as between itself and the reserving State, then the objection would not have the legal effect of limiting the scope or application of the reservation. As implied in paragraph 8 of the Special Rapporteur's ninth report (A/CN.4/544), that could result in a paradox in which the objection would be tantamount to an acceptance of the reservation by the objecting State. His delegation therefore agreed with the position of Portugal, the United States and Pakistan, referred to in footnote 34 of the Special Rapporteur's ninth report, to the effect that it would be preferable not to include a definition of "objection" in the guidelines.

59. As suggested in draft guideline 2.6.1, it might appear useful to include in the Guide to Practice a guideline establishing that it did not matter how an objection was phrased or named. His delegation did not agree with that suggestion, however, because in the case of a statement which might be considered an objection to a reservation for the purposes of part II, section 2, of the Vienna Convention but which was formulated in such a way as to raise questions as to whether it should be considered an objection, the depositary of the treaty would not be concerned with how those questions were resolved nor did it have to make a decision in that regard.

60. With regard to draft guideline 3.1, his delegation agreed with the first sentence of paragraph 400 of the Commission's report. In draft guideline 3.1.1, the chapeau and the first line immediately following it were a tautology. In the next line, the words "including the reservation in question" should be added immediately after the words "specified provisions". The same words should be added at the end of the third line as well; in that case, however, the reservation in question could not be considered to be "expressly" prohibited by the treaty.

61. The second sentence of paragraph 390 of the Commission's report confirmed his delegation's view that a reservation that was incompatible with the object and purpose of the treaty would ipso facto preclude the reserving State from becoming a party to the treaty. Consequently, any objection to a reservation based on the argument that it was incompatible with the object and purpose of the treaty should indicate that the objecting State considered the reserving State as not being a party to the treaty in question. By the same token, although in some cases the rules on objections to reservations contained in part II, section 2, of the Vienna Conventions might apply, by analogy, to such objections, they were not in principle subject to those rules.

62. The issue of the effects of a reservation that was incompatible with the object and purpose of the treaty raised serious concerns. The problem might disappear if all States adopted the practice advocated by the Nordic countries of severing incompatible reservations. It was extremely doubtful, however, that such a practice could be universally applied.

63. Paragraph 371 of the Commission's report seemed to point to the possibility that a treaty might, either expressly or implicitly, allow reservations that were incompatible with its object and purpose. A reservation that was incompatible with the object and purpose of the treaty in question should never be considered permissible; guidelines 3.1.3 and 3.1.4 were therefore unnecessary.

64. With regard to guideline 3.1.2, his delegation agreed with the last sentence of paragraph 404 of the report, except that it should also refer to the Spanish and French versions.

65. On the question of formulating a general rule for determining the object and purpose of a treaty, his delegation agreed with the last sentence of paragraph 416 of the report. There seemed to be a tendency to adopt guidelines that went beyond the scope of a guide to practice and into the sphere of interpretation of the provisions on reservations contained in the Vienna Conventions. If the General Assembly adopted such guidelines, it would be engaging in an exercise of interpretation. While that could be a useful development of international law, interpretive guidelines could also create problems.

66. **Ms. Pasheniuk** (Ukraine) expressed the hope that the codification exercise in respect of reservations to treaties in which the Commission was engaged would lead to the adoption of a set of provisions to regulate that important area of international law. As a party to the Vienna Conventions of 1969 and 1986, Ukraine supported the traditional view that in the light of articles 19 to 23 of the 1969 Vienna Convention, alternatives to reservations, modifications to reservations or late reservations made after signing, ratifying, accepting, approving or acceding to treaties should not be considered as reservations. If a modification to a reservation did not constitute a withdrawal or partial withdrawal it should constitute a new reservation which would require acceptance by the other parties to the treaty.

67. The practice of extending the 90-day period for objections to late reservations or modifications to reservations to 12 months must be compatible with article 77, paragraphs 1 (c) and 1 (e) and article 78 of the 1969 Vienna Convention, if otherwise not provided for by a treaty. The absence of objections to such kinds of reservations in the aforementioned period should not be interpreted as the tacit consent of Ukraine to such reservations. At the same time, Ukraine believed that such communications should not be ignored, especially by the depositary, and that the issue should be examined in depth by the Commission in order to develop a procedure which could be applied to such situations. Such procedures should be regulated by articles 39 to 41 of the 1969 Vienna Convention.

68. **Ms. Belliard** (France), referring to the tenth report of the Special Rapporteur for the topic "reservations to treaties" (A/CN.4/558), said that her delegation preferred the term "opposability" to "validity". The concept of "validity" was not really neutral, and the idea of "opposability" better reflected the reality of the relations between a reserving State and the other contracting parties which would result from the formulation of a reservation. By over-emphasizing the question of validity, the Commission might give the erroneous impression that the parties to a treaty could simply refuse to recognize the existence of a reservation which they considered to have no validity.

69. Her delegation agreed with the Special Rapporteur's suggestion that article 19 of the Vienna Convention on the Law of Treaties should be included in draft guideline 3.1 without substantially changing the wording. Any necessary clarifications could be included in the following draft guidelines. Draft guidelines 3.1.1 to 3.1.4 were particularly pertinent.

70. Draft guideline 3.1.5, concerning the definition of the object and purpose of the treaty, was useful but could still be improved. It was useful in that it treated object and purpose as a single concept. However, the object and purpose of the treaty should not necessarily be limited to the "essential provisions of the treaty, which constitute its raison d'être", as it was sometimes difficult to determine exactly what those essential provisions were. Equating the object and purpose of the treaty with its "essential provisions" might encourage parties to be lenient about reservations which dealt with relatively minor issues but which affected the balance of the overall text. Draft guideline 3.1.5 seemed to stress the letter of the treaty to the detriment of its spirit. Draft guideline 3.1.6, which outlined the method for determining the object and purpose of the treaty, included some useful provisions, particularly the reference to the "basic structure". That approach might also be taken to defining the object and purpose of the treaty.

71. Regarding draft guidelines 3.1.7 and 3.1.11, she noted that in practice, reservations concerning the application of domestic law were often worded in vague, general terms and might therefore give rise to concern. In such cases, the other parties to the treaty could not be sure of the extent of the reserving State's commitment to the treaty, and they might even have misgivings about the future development of the

domestic law of the reserving State. A more precise wording should be found for those two draft guidelines.

72. Turning to the question raised by the Commission concerning the practice of States that objected to a reservation which they considered incompatible with the object and purpose of the treaty yet did not oppose the entry into force of the treaty in their relations with the reserving State, she noted that such a position was paradoxical. How could a State object to a reservation that was incompatible with the object and purpose of the treaty without deciding not to be bound by the treaty in respect of the reserving State? Nevertheless, some would argue that the objecting State could decide that even though the reservation in question jeopardized the object and purpose of the treaty, that would not preclude the application of significant provisions between itself and the reserving State. The objecting State might also expect that its objection, by conveying disapproval, would open the way for what the Special Rapporteur had referred to as the "reservations dialogue" by encouraging the reserving State to reconsider the need for or the content of its reservation. However, the objecting State could not simply ignore the reservation and act as if it had never been formulated. As her delegation had already indicated, such an objection would create the so-called "super-maximum effect", since it would allow for the application of the treaty as a whole without regard to the fact that a reservation had been entered. That would compromise the basic principle of consensus underlying the law of treaties.

73. **Mr. Pellet** (Special Rapporteur) said that he appreciated the suggestions made by Committee members, in particular the United Kingdom, Austria and Sweden, for improving the dialogue on reservations to treaties. Given the complexity of his work, he could not promise to finish the first reading in 2006. He preferred to prepare a Guide to Practice based on thorough research, even if it took several years, rather than to put something together in haste.

74. Regarding his suggestion that the Commission should hold a seminar with the human rights treaty bodies in 2006, he noted that for budgetary reasons, the Commission had been unable to meet with the Committee on the Elimination of Discrimination against Women. The seminar would provide an opportunity for a general exchange of views between the Commission and the human rights bodies; however, in order to permit such an exchange, the Sixth Committee would have to adopt a resolution indicating its support for the proposal so as to enable the secretariat to find the necessary funding.

75. Turning to the substantive issue of reservations to treaties, he noted that several delegations had expressed concerns not so much about whether it was useful to define the object and purpose of the treaty as about whether that was even possible. He himself was not satisfied with his proposed text for draft guideline 3.1.5; however, he felt that it was a good start. He agreed with the representative of France that the proposed text was helpful but could be improved. He trusted that in 2006 he would be able to submit to the Commission some more workable proposals for defining the object and purpose of treaties, at least with regard to the question of validity of reservations. In particular, he wished to assure the representative of Austria that he was considering combining draft guidelines 3.1.5 and 3.1.6.

76. Turning to the issue of "super-maximum" reservations, he agreed with most of the views expressed by the representative of Sweden on behalf of the Nordic countries, but remained rather sceptical about the conclusions they had reached. He agreed that a reservation that was contrary to the object and purpose of the treaty would not be valid, that such a reservation should not be entered and that it should not have any effect. Once a State had taken that position, however, it had to decide either to be bound by the treaty as a whole or not at all. The idea that an objecting State could require another State to be bound against its will was contrary to the fundamental principle of consensus. The intention of the reserving State was the crucial issue. He refused to entertain the notion that an objecting State could require a reserving State to be bound by the treaty as a whole.

77. He was puzzled by the replies given so far to the question that the Commission had put to the Sixth Committee, at his request, regarding States that raised objections to a reservation but still considered the reserving State to be a party to the treaty and chose to be bound to it on the remaining matters. The explanations offered, in particular by the representatives of the Netherlands and France, were probably valid politically; nevertheless, he wondered why a State would insist on saying that a reservation was contrary to the object and purpose of a treaty. It could simply raise an objection without accusing the

reserving State of leaving the treaty devoid of substance. States were not required to state the reasons for their objections to reservations, so it was not even necessary to raise the issue of the object and purpose of the treaty. For a State to say that a reservation was contrary to the object and purpose of the treaty but that it still wished to be bound to the reserving State was indeed a paradox.

Agenda item 79: Report of the United Nations Commission on International Trade Law on the work of its thirty-eighth session (*continued*) (A/60/17; A/C.6/60/L.7 and L.8)

78. **The Chairman** drew attention to draft resolution A/C.6/60/L.7, entitled "Report of the United Nations Commission on International Trade Law on the work of its thirty-eighth session". He recalled that when introducing the draft resolution at the tenth meeting of the Committee the representative of Austria had announced that Azerbaijan had joined the sponsors; he wished to inform the Committee that Bolivia, the Dominican Republic, the Gambia and Latvia had also joined the sponsors.

79. *Draft resolution A/C.6/60/L.7 was adopted.*

80. **The Chairman** drew attention to draft resolution A/C.6/60/L.8, entitled "United Nations Convention on the Use of Electronic Communications in International Contracts". He recalled that at its 13th meeting the Committee had decided that the secretariat would append the dates for opening for signature in article 16 and the relevant date in the testimonium in the text of the draft Convention. In that connection, he wished to inform the Committee that the Convention would be open for signature at United Nations Headquarters from 16 January 2006 to 16 January 2008.

81. *Draft resolution A/C.6/60/L.8 was adopted.*

82. **Ms. Belliard** (France), speaking in explanation of her delegation's position, said that France had long recognized the need to create the conditions for recognizing the validity of electronic documents exchanged in concluding contracts in the context of international trade. While the draft Convention did to a certain extent contribute to that, it nevertheless had real shortcomings. First, France regretted that the fundamental concept of legal security was not better taken into account in an area — that of electronic commerce — where it was particularly necessary. Excessive flexibility was granted to the parties, which were under no obligation to indicate their place of business. Likewise, the draft Convention embodied as an absolute principle the autonomy of the parties, which would be empowered to apply the Convention to their contracts or not, or to derogate from any of its provisions. Lastly, the excessively broad definition of the scope of application of the text did not seem relevant; in fact, the Convention did not require for its application that the parties be situated in a State which had adhered to it. It therefore created obligations for States which were not be parties to it, thus constituting a precedent which did not seem desirable in international law. Her delegation wished its statement to appear in the Committee's report.

The meeting rose at 5.30 p.m.